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No. 446

In the

Supreme Court of the United States

OCTOBER TERM, 1964

MOONEY AIRCRAFT, INC.,
Petitioner,

v.

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioner, Mooney Aircraft, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on May 6, 1964 (Petition for Rehearing in the said cause having been denied on June 5, 1964).

I.

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, infra, pg. 14-32, is reported in 332 Federal 2d 135.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 6, 1964. (Appendix B, infra, page 33). Rehearing was denied on June 5, 1964. (Appendix C, infra, page 34). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

III.

QUESTION PRESENTED

1. Whether the Florida Court had jurisdiction to render judgment against Petitioner under the Due Process Clause of the Constitution of the United States.

IV.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States reading, in part, as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This cause originated with a complaint filed in the Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida. Respondents sought damages against the Petitioner for the alleged malfunction of certain parts of an aircraft engine which caused the aircraft to crash, thereby resulting in damages to the Respondents. Allegations further showed that the aircraft was purchased from Metropolitan Aircraft Corporation shortly before the wreck, and allegations of negligence and implied warranty were made against both Metropolitan Aircraft Corporation and Petitioner.

Special appearances were made by Richard H. Olsen, an attorney, on behalf of Petitioner for the purpose of quashing the citation. Upon hearing, the Florida Court denied said motion and allowed Petitioner twenty (20) days in which to file its answer. Appearance was also entered by Richard H. Olsen on behalf of Metropolitan. Petitioner failed to file pleadings and judgment was entered against Petitioner, and a non-suit was taken as to Metropolitan Aircraft Corporation.

Respondents then filed the present suit, seeking full faith and credit of the Florida judgment, contending:

(1) that due to the special appearances made by Richard H. Olsen on behalf of Petitioner for the purpose of quashing the citation, which motion was denied by the court, this ruling was res judicata as to a subsequent collateral attack, and

(2) that irrespective of the foregoing issue, Petitioner was doing business within the State of Florida within the

contemplation of the Florida Statutes and was amenable to service of process.

Petitioner contended:

(1) that Richard H. Olsen was not authorized to appear on behalf of Petitioner, and

(2) that Petitioner was not doing business within the State of Florida and, therefore, was not subject to the court's jurisdiction.

On September 23, 1958 Petitioner entered into what was styled "Distribution and Sales Agreement" with Metropolitan Aircraft Corporation. (R. 136-140, 184). This contract was executed at Kerrville, Texas. (R. 184, 185).

There was also a service agreement which was subsidiary to the "Distribution and Sales Agreement". (R. 140, 185, 186, 209, 213).

The trial court in its memorandum opinion (R. 115-170) made the following eleven pertinent findings of fact:

1. In May, 1959, in Miami, the Plaintiff, Delray Beach Aviation Corporation, purchased from the Metropolitan Aircraft Corporation an airplane manufactured by Mooney Aircraft. (R. 116-117).

2. On June 29, 1959, while the airplane was being flown by the Plaintiff, Bert Boldt, it crashed. (R. 117).

3. On March 17, 1960, the Plaintiffs brought an action in the Eleventh Judicial Circuit in and for Dade County, Florida, against Metropolitan Aircraft Corporation and Mooney Aircraft for damages sustained as a result of the crash. (R. 117).

4. On April 7, 1961, following a hearing, the Court entered judgment against Mooney Aircraft and in favor of the Delray Beach Aviation Corporation in the sum of $17,364.00 and against Mooney Aircraft in favor of Bert Boldt in the sum of $655.00. (R. 118-119).

5. During the period in question, Richard Martin was not in the employ of Mooney Aircraft and received no salary from it. He was a vice president of Mooney Sales Company. He had an office in the place of business of Mooney Sales Company at Kerrville, Texas. He, among other duties, had supervision of the distribution in Florida of airplanes manufactured by Mooney Aircraft. (R. 124).

6. Richard Martin, Vice President of Mooney Sales Company, visited Metropolitan Aircraft from time to time. Richard Martin at one time attended an aviation show in Miami where he displayed aircraft and set up a mock-up of an airplane cabin (R. 140).

7. Mooney Aircraft never qualified to do business in the State of Florida and it was never licensed to do business in that state. It never appointed an agent for the service of process in that state. (R. 135).

8. The advertisement in the February 1959 issue of the magazine Flying was paid for by the distributors and dealers listed. (R. 140-141). Neither Mooney Aircraft nor any of its officers owned any stock in Metropolitan Aircraft. None of Mooney Aircraft's officers or the members of its Board of Directors were officers or members of the Board of Directors of Metropolitan Aircraft. The

airplane that crashed was sold to Delray Beach Aviation Corporation by Metropolitan Aircraft of Miami, Florida. The airplane had been earlier purchased by Metropolitan Aircraft from Mooney Aircraft at its place of business at Kerrville, Texas, and paid for there.

9. Under the Distribution and Sales Agreement between Mooney Aircraft and Metropolitan Aircraft, which was entered into on September 23, 1958, Mooney Aircraft reserved the right to make sales in Florida for certain types of buyers. Mooney Aircraft did not exercise that right. (R. 135-140, 141).

10. Under the Distribution and Sales Agreement, Mooney Aircraft agreed that in the event of the termination of the Agreement it would purchase from Metropolitan Aircraft any new or unused Mooney products in its possession at the time of the termination. Mooney Aircraft did not repurchase any airplanes from Metropolitan Aircraft under that provision. (R. 141-142).

11. In the Distribution and Sales Agreement between Mooney Aircraft and Metropolitan Aircraft, there are present all of the following features which are indicative of the absence of the existence of a principal-agent relationship:

a. The distributor gets legal title and possession of the goods;

b. The distributor becomes liable for an agreed price;

c. The distributor can fix the price at which he sells;

d. The distributor can sell without accounting to the manufacturer for the difference between what he receives and what he pays; and

e. The risk of loss of the goods after delivery to the distributor is upon him (distributor). (R. 143).

From November 1, 1958, through October 31, 1961, Mooney Aircraft, Inc. and Mooney Sales Company operated under the terms of the following agreement:

"THIS AGREEMENT, made and entered into on this 31st day of October, 1958, by and between Mooney Aircraft, Inc., hereinafter called "First Party", and Mooney Sales Company, hereinafter called "Second Party", WITNESSETH:

First Party agrees to sell to Second Party and Second Party agrees to purchase from First Party all aircraft and aircraft parts and accessories that might be manufactured by First Party and/or that might be purchased by First Party and installed in or on aircraft manufactured by First Party at distributor's net price to be designated from time to time by First Party less 4.5% of such distributor's net price, said sum to be due and payable by Second Party to First Party within ten days after each aircraft is made ready for delivery in accordance with bona fide order received by Second Party from any authorized Mooney distributor or dealer or anyone else to whom Second Party is willing to sell.

Second Party agrees to use reasonable effort to sell, at its sole cost and expense, all aircraft manufactured by First Party." (R. 246-247, 291, Appendix D, infra, page 35).

Mooney Aircraft, Inc., and Mooney Sales Company were separate corporations, (R. 183-184), no one who owned any stock in Mooney Aircraft, Inc., owned any stock in Mooney Sales Company, (R. 226). Edward B. Hunnicutt was secretary-treasurer of both corporations, but otherwise there was no duplication of employment, (R. 222, 226), the offices of the two corporations were separate, (R. 225), the distributors

who were already established were recognized by Mooney Sales Company (R. 226), and all advertising was handled by Mooney Sales Company. (R. 246-247).

The sign reading "Mooney Sales and Service" was purchased by Metropolitan Aircraft Corporation and was the property of Metropolitan Aircraft Corporation. (R. 219-220).

During the period in question, the President of Mooney Aircraft, Inc., made two telephone calls from Midland, Texas to Miami, Florida, to Director, Graduate Placement, seeking the names of graduate mechanics who might be interested in employment by Mooney Aircraft, Inc., at Kerrville, Texas. (R. 223-224, 249-250).

During the period in question, other than the two telephone calls by the President of Mooney Aircraft, Inc., from Midland, Texas to Miami, Florida, which are referred to above, the Record is completely void of any contact, local or otherwise, between Petitioner, Mooney Aircraft, Inc., or any agent thereof, with any person, firm, corporation or institution whatsoever located in the State of Florida.

Upon hearing of the case, the United States District Court for the Western District of Texas rendered judgment for Petitioner on both issues and ordered that Respondents take nothing by way of their suit. (R. 171).

From the District Court's judgment, Respondents brought their appeal to the Court of Appeals for the Fifth Circuit, which court held that Petitioner was doing business within the State of Florida within the contemplation of the Florida Statutes and the Due Process Clause of the Constitution of the United States and rendered judgment for Respondents. (Appendix A, infra, page 14-32).

Petitioner wishes to correct the following six statements made by the Court of Appeals for the Fifth Circuit in its opinion dated May 6, 1964 (Appendix A, infra, page 14-32).

1. It is stated on page 2-3 of said opinion that "The significant fact is that it was sold to Metropolitan, as a distributor, for its use or resale within the geographical limits of the distribution area." Under the terms of the "Distribution and Sales Agreement" there were no geographical limits for the resale of aircraft by Metropolitan. (R. 135-140).

2. It stated on page 3 that "We have a Florida suit asserting a cause of action at least coming into being in Florida and closely related to the very activities giving rise to the designation by Mooney Aircraft of a Florida representative — the sale of Mooney planes in Florida." The only possible way in which the alleged cause of action in the Florida suit was related to Mooney Aircraft, Inc. was the mere fact that the airplane which was involved in the accident was manufactured by Mooney Aircraft, Inc.

3. It is stated on page 10 that "a representative acting either for Mooney Aircraft, Inc., or its exclusive sales outlet, Mooney Sales Company, made frequent trips into the State of Florida for the purpose of service calls stimulating sales, and the like." The Record and the findings of fact by Judge Henry N. Graven show that Richard Martin, Vice President of Mooney Sales Company, was the one who made the trips into the State of Florida during the period in question and by no stretch of the imagination was he a representative acting for Mooney Aircraft, Inc.

4. It is stated on page 11 that "Mooney Aircraft, engaged in the manufacture of airplanes in Texas, but aware that its commercial success depended on the intensive sale of its airplanes throughout the nation, purposefully sought to enter and compete in the Florida market." The Record is clear that during the period in question Mooney Sales Company, a Texas corporation with its only office in Kerrville, Texas, was Mooney Aircraft's exclusive sales outlet, therefore, Mooney Aircraft, Inc. was not competing in the Florida market. From and after November 1, 1958, if anyone was competing in the Florida market it was Mooney Sales Company and not Mooney Aircraft, Inc..

5. It is stated on page 11-12 that "Through this medium it was doing substantially everything which a branch could have done." The Record is clear that Metropolitan Aircraft was not restricted to the sale of Mooney airplanes exclusively. Mooney Aircraft, Inc. had no right to hire and fire the employees of Metropolitan, no right to appoint or cancel any of Metropolitan's dealers, did not participate in any profits or losses by Metropolitan and Mooney Aircraft, Inc. paid no remuneration to Metropolitan or vice versa.

6. It is stated on page 12 that "Nor, through constitutional eyes, must there be any distinction where in fact the contacts are sufficient, as they are here." As stated hereinabove, during the period in question, the only contacts by Mooney Aircraft, Inc. were two telephone calls from Midland, Texas, by its president regarding a matter completely unrelated to Metropolitan Aircraft and completely unrelated to the sale of aircraft.

REASON FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of this Honorable Court for the reason that "minimal contact" was non-existent.

It is to be noted that the suit was not concerned with matters arising out of any activity of Petitioner in the State of Florida.

In the case of *International Shoe Company v. State of Washington, 326 U.S. 310, 66 S. Ct. 154,* for a period of several years, the Appellant employed 11 to 13 salesmen under direct supervision and control of sales manufacturers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that State; and they were compensated by commissions based upon the amount of their sales. Appellant supplied its salesmen with a line of samples, each consisting of one shoe of a pair, which they displayed to prospective purchasers. On occasions, they rented permanent sample rooms for exhibiting samples, in business buildings, or rented rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals was borne by Appellant. The authority of the salesmen was limited to exhibiting the samples and soliciting orders from prospective buyers, at prices and on terms fixed by Appellant. The salesmen would transmit the orders to Appellant's office in St. Louis for acceptance or rejection and when accepted, the merchandise for filling the orders was shipped F.O.B. from points outside Washington to the purchasers within the State.

This is the leading case which enunciates the "minimal contact" doctrine but it is obvious that this Honorable Court would have held that the State of Washington did not have jurisdiction over Appellant under the Due Process Clause except for the fact that the obligation which was being sued upon arose out of the activity of Appellant in the State of Washington.

Petitioner had no salesmen or other employees or agents who resided in Florida and the aircraft manufactured by Petitioner was sold, paid for and delivered at its place of business at Kerrville, Texas. *Furthermore, the obligation sued upon did not arise out of any activity of Petitioner in the State of Florida.*

Chief Justice Warren in the majority opinion in the case of *Hanson v. Denckla, (1958), 357 U.S. 235, 78 S. Ct. 1228, 2. L. Ed. 1283*, referred to the trend away from the earlier rigid rules in connection with state jurisdiction over non-residents and then went on to state (p 251 U.S.):

> " But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * Those restrictions are more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him * * *."

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20878

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Appellants,

versus

MOONEY AIRCRAFT, INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas.

(May 6, 1964.)

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

BROWN, Circuit Judge: The question in this case is whether the Florida Long Arm service of process statute reaches as far as Texas. The District Judge, in a suit brought on a Florida State Court default judgment, answered in the negative. Picking our way as best we

can on this *Erie* trail, *cf. United Services Life Ins. Co. v. Delaney, Paul Revere Life Ins. Co. v. First Nat'l Bank*, 5 Cir., en banc, 1964, ... F.2d .... [Nos. 19531, 19604, February 4, 1964] (concurring opinion), we conclude that as Florida construes its Act, the operations of defendant-appellee were within the reach of the statute. And consideration of these same factors demonstrates that for the limited federal due process inquiry, no constitutional obstacle exists. We therefore reverse.

The State Court suit was brought by a purchaser[1] against Mooney Aircraft,[2] the manufacturer of the Texas-built Mooney Mark 20A. Sought were damages for the total loss of the plane when it crashed in Florida allegedly due to faulty manufacture. Delray had purchased the plane from Metropolitan[3] in the regular course of Metropolitan's operations as the distributor for Mooney Aircraft in this particular area. Metropolitan had earlier acquired the plane from Mooney Aircraft. Utterly irrelevant to our problem is Mooney Aircraft's insistence—which we may credit arguendo—that this sale was made in Texas, where title passed, not in Florida. The significant fact is that it was sold to Metropolitan, as a distributor, for its use or resale

[1] The purchaser was Plaintiff, Delray Beach Aviation Corporation; also joined as a Plaintiff was Bert Boldt, the pilot, suing for personal injuries.

[2] Mooney Aircraft, Inc. This Kansas corporation is to be distinguished from Mooney Sales Company, a Texas corporation.

[3] Metropolitan Aircraft Corporation.

within the geographical limits of the distribution area. Consequently, one of the some-time obstacles is not present here. We have a Florida suit asserting a cause of action at least coming into being in Florida and closely related to the very activities giving rise to the designation by Mooney Aircraft of a Florida representative—the sale of Mooney planes in Florida.[4]

The Florida arm is not only long. It is strong, and its sinews were strengthened by the legislative reflex to court decisions. In 1951 Florida enacted §47.16 subsection 1.[5] This Act like others in Arkansas, Illinois, Maryland, Minnesota, Vermont, Washington, and Wis-

[4] Thode, In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; And the Appearance to Challenge Jurisdiction in Texas and Elsewhere, 42 Texas L. Rev. 279, 303 (1964).

[5] Fla. Stat. §47.16(1) provides:

"(1) The acceptance by any person or persons, * * *, who are residents of any other state or country, and all foreign corporations, * * *, of the privilege extended by law to nonresidents and others to operate, conduct, engage in, or carry on a business or business venture in the state, or to have an office or agency in the state, shall be deemed equivalent to an appointment by such persons and foreign corporations of the secretary of state of the state as the agent of such persons or foreign corporations upon whom may be served all lawful process in any action, suit or proceeding against them * * * arising out of any transaction or operation connected with or incidental to such business or business venture, and the acceptance of such privilege shall be signification of the agreement of such persons and foreign corporations that any such process against them * * * shall be of the same legal force and validity as if served personally on such persons or foreign corporations. Service of such process shall be in accordance with and in the same manner as now provided for service of process upon nonresidents under the provision of §47.30. Provided that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resident agent as now provided by statute."

consin" reflects a purpose to reach as far as the Federal Constitution permits. The indications are that when the Second Circuit found this statute inadequate to sustain an earlier Florida State Court judgment, *Berkman v. Ann Lewis Shops, Inc.*, 2 Cir., 1957, 246 F.2d 44, affirming S.D.N.Y., 1956, 142 F.Supp. 417, Florida responded to the Court's suggestion that "this is not to say that a statute might not constitutionaliy be drawn, which would make the presence in a state of a wholly-owned subsidiary of a foreign corporation sufficient basis to assert jurisdiction over the parent company."[7] See 142 F.Supp. 417, at 422. It did

[6] See Thode, supra, note 4, at 304.

We are indebted to that article (id. at 397 nn. 172, 173) for correcting the typographical error perpetuated by the law reports so that "amendability" reads "amenability" in the extract from Lone Star Motor Import, Inc. v. Citroen Cars Corp., 5 Cir., 1961, 288 F.2d 69, 72-73. There, speaking of the purpose of the Texas Long Arm Statute, we said:

"Indeed, it seems highly likely that, as is true for similar legislation in many other states * * * the Texas purpose was to exploit to the maximum the fullest permissible reach under Federal constitutional restraints. It was also, as it has been for other states, a means of avoiding the troublesome difficulties of tying *amenability* of service of process to taxability of a foreign corporation, or denying it access to the courts and related problems of the regulation of the right to do business." (Footnotes omitted, emphasis supplied.)

See also Stanga v. McCormick Shipping Corp., 5 Cir., 1959, 268 F.2d 544, 550; Bluff Creek Oil Co. v. Green, 5 Cir., 1958, 257 F.2d 83, 86; Green v. Bluff Creek Oil Co., 5 Cir., 1961, 287 F.2d 66, 67 n.1.

[7] In Deere & Co. v. Watts, Fla.Dist.Ct.App., 1963, 148 So.2d 529, the Florida Court quoted, as we did above, from the District Court opinion in the *Berkman* case and stated with reference to the 1957 amendment:

"The language of the district court decision, however, indicated that had Florida enacted a statute authorizing such substituted service, it would be constitutional.

"* * *

"In accordance with the language of the Berkman decision it is our opinion that the service of process

this[8] by adding Subsection 2 to §47.16, note 5, *supra* so as to encompass distributors, jobbers, wholesalers, and brokers for foreign corporations.[9] And the muscles were beefed up by the legislative declaration of policy stated in emphatic terms.[10]

Although the cases do speak in terms of the one invoking substituted service having the "burden of pre-

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upon the appellant, in conformity with our §§47.16 and 47.30 * * * met all the requirements of due process of law."

148 So.2d 529, at 531, 532.

[8] Florida has responded to court decisions with legislation before. See Fla.Stat. §768.01 as amended, Fla.Laws 1953, ch. 28280, §1. The 1953 amendment was presumably a response to this Court's decision in Graham v. A. Lusi, Ltd., 5 Cir., 1953, 206 F.2d 223, see Emerson v. Holloway Concrete Prod. Co., 5 Cir., 1960, 282 F.2d 271, 278, 285 (dissenting opinion).

[9] Fla.Stat. §47.16(2): "Any person, firm, or corporation which, through brokers, jobbers, wholesalers, or distributors sells, consigns, or leases, by any means whatsoever, tangible or intangible personal property, to any person, firm or corporation in this state, shall be conclusively presumed to be operating, conducting, engaging in or carrying on a business or business venture in this state." Florida Laws 1957 ch. 57-747, §1.

[10] "WHEREAS, persons, firms, and corporations in other jurisdictions are directly or indirectly furnishing millions of dollars worth of tangible and intangible personal property to persons, firms and corporations in this State each year; and

"WHEREAS, litigation in both tort and contract frequently arises out of the purchase, lease, consignment, use and consumption of such property each year; and

"WHEREAS, the cost and expense of going to other jurisdictions, both national and international frequently has the practical effect of denying all rights and remedies regarding such purchase, lease, consignment, use and consumption; and

"WHEREAS, it is just and fair that such litigation be conducted in this state, rather than in a foreign jurisdiction, NOW, THEREFORE,

"Be It Enacted by the Legislature of the State of Florida:"

Fla. Laws 1957 ch. 57-747.

senting a situation that clearly justifies its application," since the "statute must be strictly construed," *Fawcett Publications, Inc. v. Rand*, Fla. Dist.Ct.App., 1962, 144 So.2d 512, 514, the Florida decisions—many of them prior to the sweeping amendment of 1957—have given a very liberal application in actual practice to §47.16.[11] And none represents a retreat from the legislative objective. The requirement that one invoking the provisions of §47.16(2) "has the burden of presenting a situation that clearly justifies its application," 144 So.2d 512, 514, is no judicial contraction. It is primarily the prescription of a sound administrative practice. Florida Courts are rightly conscious that there are limits. They are aware that, as recently put by Judge Jones for this Court, "Hanson v. Denckla[12] * * * teaches that, although the door of non-resident jurisdiction has been opened wider by *International Shoe* and *McGee*, it has not been removed from its

[11] E.g., State ex rel. Weber v. Register, Fla., 1953, 67 So.2d 619 (out-of-state owner of orange grove subject to jurisdiction of Florida courts in suit to recover real estate commission since listing of grove for sale is "business venture" within meaning of §47.16); State v. Harrison, Fla., 1954, 74 So.2d 371 (foreign corporation engaged in the sale of "retail credit discount" warranties in Florida by means of brokers was engaged in a business venture within scope of §47.16); Wm. E. Strasser Constr. Corp. v. Linn, Fla., 1957, 97 So.2d 458 (jurisdiction of breach of contract suit by contractor against individual nonresident owners of land who had entered into construction contract for building of apartment house upheld under §47.16—suit was on Sec of State); Continental Copper and Steel Industries, Inc. v. E. C. "Red" Cornelius, Inc., Fla.Dist.Ct.App., 1958, 104 So.2d 40 (out-of-state manufacturer of electrical cable subjected to jurisdiction of Florida Courts in breach of warranty suit by contractor).

Certainly the cases construing subsection 2 of §47.16, note 9, supra, reveal no begrudging attitude which would otherwise thwart the legislative policy declaration.

[12] 1958, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

hinges." *Dooly v. Payne*, 5 Cir., 1964, ... F.2d .... [No. 20382, January 21, 1964]. The result is that some party has the obligation of bringing forward the relevant information sufficient to satisfy the due-process and local statutory requirements. Florida puts it squarely on the one invoking the process.

Nor is any such restrictive approach to be found in the dual substantive standard set forth in *Fawcett Publications, Inc. v. Rand*, Fla.Dist.Ct.App., 1962, 144 So.2d 512, just discussed, *supra*, and other similar cases. *Fawcett Publications, Inc. v. Brown*, Fla.Dist.Ct.App., 1962, 146 So.2d 899; *Jenkins v. Fawcett Publications, Inc.*, D.C. Fla., 1962, 204 F.Supp. 361. Giving substantive content to the procedural burden discussed above, the Court in the *Rand* case requires that the one invoking the process must demonstrate either "(1) that the foreign corporation has some degree of control over the personal property referred to in §47.16, *supra*, in the hands of the 'brokers, jobbers, wholesalers or distributors' selling or distributing the personal property in this State, or (2) that the foreign corporation has some degree of control over the 'brokers, jobbers, wholesalers or distributors' selling or distributing the personal property in this State." 144 So.2d 512, 514.

In the recent decision in *Deere & Co. v. Watts*, Fla.Dist.Ct.App., 1963, 148 So.2d 529, the same Court of Appeals deciding *Rand* sustained service on the non-resident parent by service on the local subsidiary. The action of the subsidiary in Florida was substantially

that of a jobber or distributor, and element (2) of *Rand* was satisfied by evidence showing "the extent of the subsidiary's activities within" Florida and, more important for our situation, "the degree of control which the appellant [nonresident parent] was *capable of exercising* over the operations and policies of the subsidiary." (Emphasis added.) The result could not have been surprising since the Court "felt impelled to give full effect to the legislative intent apparent in §47.16(2)." 148 So.2d 529, 531.

The evidence overwhelmingly demonstrates that Mooney Aircraft had the requisite control over Metropolitan, its distributor. There were two simultaneously executed agreements, the "Distribution and Sales Agreement" and the "Service Agreement." The "Distribution and Sales Agreement" appears to be the master agreement since in §II Par. 2, the distributor is required to "Maintain service facilities in accordance with the terms of the accompanying Service Agreement." The Agreements bound Mooney Aircraft to sell its airplanes to the distributor at wholesale prices, to supply advertising and promotional material and sales aids, to maintain a service department, to maintain a stock of repair parts and a staff of service representatives available to the distributor for personnel training and consultation, to train distributor servicemen at the Texas factory and furnish signs showing a distributor to be an "Official Mooney Service Center" when any of its servicemen had been certificated by Mooney Aircraft and finally, to refrain from appoint-

ing any other distributors within the assigned territory.[13]

The Agreements likewise imposed heavy obligations, both express and implied, on the Distributor. Many of these obligations were stated in quantitative or qualitative terms which necessarily implied appraisal of their sufficiency by Mooney Aircraft, Inc.[14]

The overriding purpose of the Agreements was to stimulate the sales and service of airplanes manufactured and sold by Mooney Aircraft. The distributor was required to "provide adequate sales facilities, maintain sales staff and cover intensively and consistently through sales solicitation, advertising and promotional activities, the distributor's territory." It was to be identified as a Mooney distributor by ownership

[13] The territory was described as "the State of Florida, excluding the Counties of Escambia, Santa Rosa, Okaloosa, Walton, Holmes, Washington, Bay" and "in the State of Georgia: the southern counties bordered on the north by and including Miller, Mitchell, Coloquitt, Cook, Berrien, Atkinson, Ware, Brantley, Glynn."

[14] In §III of the Service Agreement, the Distributor agreed to (1) "* * * send at least one qualified serviceman for training at the Mooney Factory Service School," (2) "maintain service facilities for all owners of Mooney airplanes "including adequate equipment to permit proper testing and normal repair, and an adequate stock of repair parts as recommended by Mooney Aircraft Service Department as well as qualified technical personnel * * *," (3) "display prominently any signs or Certificates" showing servicemen "Certificated by Mooney Aircraft, Inc.," (4) "furnish free service to all aircraft sold by it in cases where the Mooney warranty is applicable," (5) "establish a schedule of charges for service * * * which shall become effective when approved by the Mooney Aircraft Service Department manager," (6) "respond promptly to all requests for service on Mooney aircraft," and (7) "observe carefully all CAA rules and regulations on servicing any Mooney aircraft."

of demonstrator aircraft and posting of adequate display signs. And sales were not limited to its own since the distributor was required to "solicit and appoint dealers and representatives within the assigned territory for the promotion of retail sales of new Mooney Aircraft." Virtually unlimited control was given to Mooney Aircraft over the distributor's performance since Mooney Aircraft could cancel for "breach of contract" by immediate written notice and without cause of any kind by thirty days' written notice prior to an anniversary date.

The evidence is also uncontradicted that this was no mere paper arrangement. A representative acting either for Mooney Aircraft, Inc. or its exclusive sales outlet, Mooney Sales Company, made frequent trips into the State of Florida for the purpose of service calls stimulating sales, and the like.[15] And Mooney Aircraft held out to the world—at least the flying

[15] The Distributor—Service Agreement was executed September 23, 1958. It was not terminated until after the Florida State Court suit. These Agreements governed the relations between Metropolitan and Mooney Aircraft for the sale, distribution and service of airplanes in the prescribed territory. No contractual relationship was established between Metropolitan and Mooney Sales Company. Consequently, the exclusive Sales Agreement between Mooney Aircraft, Inc. and Mooney Sales Company dated October 31, 1958, stated to "be perpetual" but effectually cancelled when Mooney Aircraft and Mooney Sales merged in 1961 is of no significance. This is so even assuming, as contended, that the traveling representative Martin was an employee of Mooney Sales Company only, and not Mooney Aircraft. The sales and servicing of Mooney planes in this Florida-Georgia territory had been exclusively committed to Metropolitan by Mooney Aircraft. Additionally, the national advertising subsequent to October 31, 1958, see note 16, infra, treated Metropolitan as a sales and service distributor of Mooney Aircraft, Inc.

world—that its representative in Florida was Metropolitan Aircraft Corporation. In the February 1959 issue of Flying, modestly described as "The World's Most Widely Read Aviation Magazine," there was a double spread ad sounding the praises of Mooney's airplanes and its sales and service distributors and representatives.[16]

Mooney Aircraft, engaged in the manufacture of airplanes in Texas, but aware that its commercial success depended on the intensive sale of its airplanes throughout the nation, purposefully sought to enter and compete in the Florida market. With a choice of doing it by direct employees in a company branch, or through a traditional sales and service distributor, it deliberately chose the latter. In so doing, it was careful to maintain its own image, reputation and prestige, through the means of broad and exacting supervisory control over the quality and type of its distributors' activities. Through this medium it was doing sub-

[16] On the left hand page just above a tabulated list by states of the distributors, including Metropolitan, the advertisement stated: "We, distributors and dealers of Mooney Aircraft, invite you to see and fly the Mark 20 and Mark 20A * * * and we assure our many customers of fast, efficient factory-like maintenance service." On the right hand side was the Company's sales pitch bearing the name "Mooney Aircraft, Inc., Kerrville, Texas" in large type and ending with the plea, "See your Mooney distributor or dealer now."

Since it is uncontradicted that the copy for the advertisement was prepared by, and its publication arranged through, the public relations counsellor for Mooney Aircraft, it is irrelevant that all or a substantial part of the cost of the space may have been contributed by the respective distributors whose names were listed.

stantially everything which a branch could have done. Florida, as a matter of deliberate policy (see note 10, *supra*) sees no distinction between the two. Nor, through constitutional eyes, must there be any distinction where in fact the contacts are sufficient, as they are here.[12]

Holding, as we do, that by virtue of its operations through Metropolitan, its distributor, §47.16(1)(2), Mooney Aircraft was engaged in business activity within the State of Florida and therefore amenable to service of process, the question still remains whether the manner of service was proper. There is no question about actual notice. Mooney Aircraft was informed on at least four occasions, twice by the counsel for the State Court plaintiffs, and twice by Metropolitan, that the suit had been filed. Guided by its president-lawyer-witness, *cf. Rachal v. Allen*, 5 Cir., 1963, 321 F.2d 449, 451 (dissenting opinion), Mooney deliberately took the bold course of ignoring the Florida summons. Any lurking due process problems are therefore narrowly confined to the question of whether the Florida statutory structure reasonably assures that the nonresident will have fair notice and an opportunity for a fair defense. See *Wuchter v. Pizzutti*, 1928, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446; *National Equipment Rental v. Szukhemt*, 1964, ... U.S. ...., 84 S.Ct. ...., 11 L.Ed.2d 354, 357.

[12] See Thode, supra note 4, at 297-310, and see especially 303-04.

The process was not served on the Florida Secretary of State. Rather, the service was made on Metropolitan (through its vice-president) as the "resident agent, in the absence of the president, vice president, cashier, treasurer, secretary, general manager and director"[1] of Mooney Aircraft. As we understand Mooney Aircraft's contention, it is this. Although Metropolitan, the so-called resident agent, sent the process on so that Mooney Aircraft had direct, positive, written, official information as to the pendency of the suit and the purported service of process on it, Metropolitan was not a "resident agent" and therefore as a matter of technical Florida statutory requirement, the service was imperfect. This necessarily assumes that had the service been had upon the Secretary of State, it would have been technically sufficient. The additional claim is then made that since the statute does not expressly compel the "resident agent" to transmit the process to the foreign corporation, there is no assurance that it would be received, and hence the statute is constitutionally deficient.

The last two sentences of §47.16(1) prescribe that the service of the process "shall be in accordance with and in the same manner as now provided for * * * under the provision of §47.30." The last adds a proviso "that if a foreign corporation has a resident agent in the state, service of process shall be had upon such resi-

[1] This was the plain meaning of the abbreviations used in the sheriff's return.

dent agent as now provided by statute." This brings into play §§47.30[19] and 47.17.[20]

Guided, as we must be, by the Florida standard concerning the attributes of one having the status of an "agent" for service of process, we think that Metropolitan was "a resident agent" and that service of process "upon such resident agent" was permissible. The District Judge seemed to think that Metropolitan could not be acting for Mooney Aircraft since each was engaged in its own separate business within the State of Florida. If that means that factually Mooney Aircraft was carrying on business within this assigned territory in its own right independent of Metropolitan, there is

[19] "§47.30 Method of service upon nonresident.—Service of such process shall be made by * * * either leaving a copy of the process * * * in the hands of the secretary of state * * * or by mailing a copy * * * to the secretary of state; and such service shall be sufficient service upon a defendant who has appointed the secretary of state as his agent for the service of such process; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff, or his attorney, to the defendant, and the defendant's return receipt and affidavit of the plaintiff, or his attorney, in compliance herewith are filed with the papers * * * or that such notice and copy are served upon the defendant, if found within the state, * * *. Proof of service of process on the secretary of state shall be by a copy of the notice of said secretary accepting such process."

[20] "§47.17. Service of process on private corporation. Process against any corporation, domestic or foreign, may be served:

(1) [on president, vice president]
(2) [on cashier, treasurer, etc.]
(3) [on director of the company]
(4) Upon any officer or business agent, resident in the state.
(5) If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be had upon any agent transacting business for it in this state.
(6) [section not applicable insurance companies]
(7) the provisions of this section shall be cumulative to all existing laws."

no basis in fact for such a finding. F.R.Civ.P. 52(a). If it means to imply that one cannot be a resident agent if his own interests are being advanced while serving the so-called principal, we thing it is erroneous in law. Indeed, any such reasoning would be a repudiation of §47.16(1), and especially subsection (2). Under subsection (1), the acceptance by a nonresident "of the privilege * * * to operate, conduct, engage in, or carry on a business or business venture in the state" is deemed to be an appointment of the secretary of state as the resident agent. Under subsection (2), anyone who "sells, consigns, or leases, by any means whatsoever" personal property "through brokers, jobbers, wholesalers, or distributors" shall be "conclusively presumed to be operating, conducting, engaging in or carrying on the business or business venture in this state."

If Florida constitutionally can, under certain circumstances, declare that one can be carrying on a business through a distributor, then it is incongruous to conclude, as the District Judge presumably did, that the actions of Metropolitan were not in furtherance of the interests of Mooney Aircraft.

The inescapable fact which courts ought to be able to recognize is that Mooney Aircraft and Metropolitan had, to a great extent, a mutual interest in the sale, service, and distribution of Mooney airplanes. Paraphrasing a celebrated apothegm, what was good for Metropolitan was good for Mooney Aircraft, and vice versa.

Although Metropolitan and Mooney Aircraft did not stand in the traditional relationhip of principal and agent, their close economic business ties were sufficient to satisfy the Florida standard that there be a "legal or moral duty on the part of the [agent] to report and properly handle a summons served on him as agent of" the foreign corporation. *Mason v. Mason Prod. Co.*, Fla., 1953, 67 So.2d 762, 763.

This principle is followed by numerous courts. In *Fiat Motor Co. v. Alabama Imported Cars, Inc.*, D.C.Cir., 1961, 292 F.2d 745, 747, the Court held that the District of Columbia Code provision for service "on the agent of such corporation or person conducting its business" was broad enough to cover a distributor similar to Metropolitan since the distributor "occupies such a responsible representative status as to make it reasonably certain that he will turn over the process." That Court cited our earlier decision in *Acme Eng'r, Inc. v. Foster Eng'r Co.*, 5 Cir., 1958, 254 F.2d 259. Of course this approach was recognized in *International Shoe* where the Court stated that it "is enough that [the foreign corporation] has established such contacts with the state that the particular form of substituted service adopted * * * gives *reasonable assurance* that the notice will be actual." 326 U.S. 310, at 320. (Emphasis supplied.)

It would be difficult to conceive of a relationship imposing a greater duty, either legal or moral, on the part of Metropolitan to forward a court summons to Mooney Aircraft. The claim arose out of the failure of

a Mooney airplane in flight. The business reputation, prestige and future sales of both Mooney Aircraft and its distributor, Metropolitan, made it important that this litigation be properly handled. With so much at stake for each in the future sales of Mooney airplanes in that wide area, there was every reason to suppose that Metropolitan would do exactly as it did—transmit the process immediately. Within the broad qualitative-quantitative standards imposed by the distributor sales and service agreement, Metropolitan would be aware that failure to give notice to Mooney Aircraft in time for it reasonably to protect its inferests would subject the distributor to the likely cancellation of the contract and the termination of what must have been deemed to be a profitable business connection. As we said in *Acme Eng'r, Inc.* of a Texas "traveling salesman," Metropolitan here "occupies such a responsible representative status as to make it reasonably certain that [it] will turn over the process to its company." And there, as here, the fact that the representative "actually passed [the process] on" may be considered in determining that reasonable probability. 254 F.2d 259, 263. It is this strong compulsion, whether described as a moral or a legal duty, to transmit the process on to the nonresident which supplies what was held to be the missing compunction in *Wuchter v. Pizzutti*, 1928, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446.[21]

And in assaying the federal constitutionality of the Florida Statute, we must certainly look at it in the light

[21] "We have here no accidental relation of a transcient automobilist and service of process upon the Secretary of State, a person wholly unrelated to the defendant, his business, or, indeed, his presence in the state.

of Florida procedures which afford to a nonresident defendant a full and unconditional opportunity to contest jurisdiction over the person of the defendant to the bitter end. Rule 1.11(b), 1954, Florida Rules of Civil Procedure, copied from F.R.Civ.P. 12, allows the defense of "* * * (2) lack of jurisdiction over the person * * * (4) insufficiency of process, (5) insufficiency of service of process * * *" to be made by motion.[22] The rule was adopted with the purpose of abolishing former distinctions between general and special appearances, see *Greenburg v. Greenburg*, Fla.Dist.Ct.App., 1958, 101 So.2d 608, and the Supreme Court in *State of Florida ex rel. Eli Lilly and Co. v. Shields* Fla., 1955, 83 So.2d 271, has held that objection to the Court's jurisdiction over the person of the defendant is not waived or prejudiced by participation in the trial and defense after the objections are overruled.

That means that Mooney Aircraft, armed with full, correct copies of the State Court pleadings and process, with detailed specific information from Metropolitan concerning the pendency of the case and the right under Florida practice to enter a special appearance, had a full, unrestricted opportunity to have the Florida Court pass upon its own statute and the sufficiency of the facts to support either amenability or the method of service, with right of review to the United States Supreme Court thereafter as to any federal constitutional questions. Of course the presence

[22] See Thode, supra, note 4, at 283-84, grouping Florida with 22 other states using the motion practice.

of this sensible and fair procedure does not compel a nonresident to submit either for the determination of that issue or the trial of the merits of the case. But in no sense does the risk of standing one's ground on amenability to process carry with it a forfeiture of the right to present a defense. That Mooney Aircraft has lost that opportunity is the consequence of its own deliberative choice to take the bold course.

The result is that the Florida State Court judgment is entitled to full faith and credit, and the District Court should enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20878

D. C. Docket No. 3015 Civil

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Appellants,

V.

MOONEY AIRCRAFT, INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court, with directions for entry of judgment in accordance with the opinion of this Court.

It is further ordered and adjudged by this Court that the appellee, Mooney Aircraft, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

May 6, 1964

Issued as Mandate: JUNE 16, 1964

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 20,878

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Appellants,

V.

MOONEY AIRCRAFT, INC.,

Appellee.

Appeal from the United States District Court for the Western District of Texas

(June 5, 1964)

On Petition for Rehearing

Before HUTCHESON and BROWN, Circuit Judges, and CHRISTENBERRY, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

APPENDIX D

THIS AGREEMENT, made and entered into on this 31st day of October, 1958, by and between Mooney Aircraft, Inc., hereinafter called "First Party", and Mooney Sales Company, hereinafter called "Second Party", WITNESSETH:

First Party agrees to sell to Second Party and Second Party agrees to purchase from First Party all aircraft and aircraft parts and accessories that might be manufactured by First Party and/or that might be purchased by First Party and installed in or on aircraft manufactured by First Party at distributor's net price to be designated from time to time by First Party less 4.5% of such distributor's net price, said sum to be due and payable by Second Party to First Party within ten days after each aircraft is made ready for delivery in accordance with a bona fide order received by Second Party from any authorized Mooney distributor or dealer or anyone else to whom Second Party is willing to sell.

Second Party agrees to use reasonable effort to sell, at its sole cost and expense, all aircraft manufactured by First Party.

The period of duration of this agreement shall be perpetual.

EXECUTED in duplicate originals on the day and year first above written.

MOONEY AIRCRAFT, INC.	MOONEY SALES COMPANY
By s/ HAL RACHAL President FIRST PARTY	By s/ NORMAN HOFFMAN President SECOND PARTY

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1964

No. 446

MOONEY AIRCRAFT, INC.,

Petitioner,

V.

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Respondents.

Brief In Opposition To Petition Of Writ Of Certiorari

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1964

No. . . . . : :

MOONEY AIRCRAFT, INC.,

Petitioner,

V.

DELRAY BEACH AVIATION CORPORATION and BERT BOLDT,

Respondents.

Brief In Opposition To Petition Of Writ Of Certiorari

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents, Delray Beach Aviation Corporation and Bert Boldt, pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, be denied.

I.

GROUNDS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Petitioners have not been deprived its rights under the due process clause of the Constitution of the United States in that all necessary elements for the Florida Court to render judgment were existent.

II.

ARGUMENT

Petitioners, in its Petition for Writ of Certiorari, seek to invoke the jurisdiction of this Court solely upon the grounds that it was denied its rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Since the case of **International Shoe Co. v State of Washington**, 326 U.S. 310, 66 S.Ct. 154, decided in 1945, there has been a clear and distinct trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. Numerous states have enacted statutes in light of this trend in order to "exploit to the maximum the fullest permissible reach under federal constitutional restraints". **Lone Star Motor Import, Inc., v. Citroen Cars Corp.**, 288 F.2d 69 72-73. (Fifth Cir. 1961).

In 1957, Fla. Stat. Sec. 47.16 (2) was enacted, and the Florida legislative intent to extend jurisdiction within constitutional limits was clearly set forth by the preamble which immediately preceded this enactment. This statute and the legislative intent were accorded great weight by the Honorable Judge John R. Brown, writing the opinion for the Fifth Circuit in the instant case, and are fully set out in

detail. **Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.**, 332 F. 2d 135, 138 (note 9 & 10).

Petitioners contend in their brief that they did not have the requisite "minimum contacts" within the State of Florida, and therefore, were not subject to the jurisdiction of the Florida Court. This position is totally untenable for two reasons.

(1) The record clearly reveals that Mooney Aircraft, Inc., through Richard Martin, a representative acting either for Mooney Aircraft, Inc., or Mooney Sales Co., its exclusive sales outlet, had sufficient contacts with the State of Florida to satisfy the "minimum contacts" test. (R. p. 280 - 283 incl.).

Counsel for petitioners goes to great extent to distinguish between Mooney Aircraft, Inc., and Mooney Sales Co., but as succinctly noted by Judge Brown in his opinion, there was no contractual relationship between Metropolitan, the distributor, and Mooney Sales Co. **Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.**, supra, (p. 140, n. 15). The record further discloses that Mooney Sales Co. was not even in existence at the time of the contract between Metropolitan and Mooney Aircraft, Inc., and at the time of its execution, Richard Martin was sales manager of Mooney Aircraft, Inc. (R. p. 286). Any arrangements or agreements made between Mooney Aircraft, Inc., and Mooney Sales Co. subsequent to the date of the contract in question, certainly could not alter the terms or relationship between Mooney Aircraft, Inc., and Metropolitan.

(2) The Florida Statute does not require that the foreign corporation "itself" be doing business within the state, but only that they be transacting business through distributors, jobbers, wholesalers or brokers. The effect of this statute, however, has been cautiously restricted by the Florida

Courts who place the burden on the resident to show that the foreign corporation has "some degree of control over the brokers, jobbers, wholesalers, or distributors". **Fawcett Publications, Inc., v. Rand,** (Fla. App. Third District, 1962), 144 So. 2d 512. This restriction has been made by the courts for the sole purpose of preventing this statute from being too broad and thereby denying a person his constitutional rights under the due process clause. The Florida Courts have felt compelled to give "full effect" to this statute but only after sufficient facts are presented showing the "control" a foreign corporation is "capable of exercising" over the local agency. **Deere and Co. v. Watts,** (Fla. App. Third District, Jan. 1963), 182 So. 2d 529.

It was stipulated by all parties that Metropolitan Aircraft Corp. was doing business in the State of Florida as a distributor for Mooney Aircraft, Inc., in accordance with the terms of Defendants' Exhibit B. (R. p. 47). As stated by Judge Brown, "the evidence overwhelmingly demonstrates that Mooney Aircraft, Inc., had the requisite "control" over Metropolitan, its distributor. **Delray Beach Aviation Corp., v. Mooney Aircraft, Inc.,** supra (p. 140).

Petitioners have consistently taken the position, as they do now, that the mere fact that they entered into a so-called distributorship contract, this alone prevents them from being subjected to the jurisdiction of the Florida Courts. This contention completely ignores the Florida Statutes as well as the terms of the contract itself which retains numerous details of control over the distributor which Mooney Aircraft was **capable of exercising.** (emphasis ours) Petitioners attempt to stress that, even though the contract makes provision for certain control by Mooney over its distributor, they did not in fact elect to exercise these rights. This argument is very weak and certainly

without substance since surely the test must be what control Mooney was capable of exercising, rather than what they, themselves, chose to exercise.

Needless to say, this is not the first instance wherein a foreign corporation has sought to set up a subsidiary or distributor as a subterfuge and thereby circumvent state statutes. In the cases of **Facht v. Southwestern Skyways, Inc., v. Cessna Aircraft Co.,** (D. Colo. 1963) 220 F. Supp. 441; **Fiat Motor Co. v. Alabama Imported Cars, Inc.,** 292 F. 2d 745 (D.C., 1961); **Florio v. Power Powder Tool Corp.,** 248 F. 2d 367 (Third Cir. 1957): this very contention was made, and in each instance, the courts upheld the constitutionality of the State Statute and held that the distributorship contracts were so restrictive and exercised, or were capable of exercising, so much control, the foreign corporations themselves were in effect doing business within the various states.

III.

CONCLUSION

Petitioners are contending they have been deprived of due process. Under the holding of the **International Shoe Co. v. State of Washington,** supra.

> "Due process requires only that, in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he has certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice".

As noted by the Court in **McGee v. International Life Insurance Co.,** (1957) 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223, if the non-resident has actual notice and a reasonable

opportunity to defend, the requirement of the Fourteenth Amendment as to due process, has been complied with.

There is no question in the instant case about actual notice, nor a reasonable opportunity to defend. Failure to appear was solely the result of a calculated and intentional decision to completely ignore the suit.

Respondents are well aware that the present trend toward expansion of jurisdiction has not removed all restrictions as held in the case of **Hanson v. Denckla,** (1958) 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283, but under the foregoing circumstances, Respondents contend they have met the burden of proving that the petitioners had the required "minimum contacts" within the State of Florida, and therefore, petitioners have not been denied due process in any respect. Accordingly, Respondents respectfully pray that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

GREEN, GREEN & WILEY

By

ROBERT E. THORNTON
DAYTON G. WILEY
905 Alamo National Building
San Antonio, Texas 78205

Attorneys for Respondents

CERTIFICATE

I certify that a true copy of the above has been mailed to Mr. Hal Rachal, Box 872 Midland, Texas, Attorney for Petitioners on this day of September, 1964.

Robert B. Thornton